No. 20069

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LOZANO ENTERPRISES,

Petitioner,

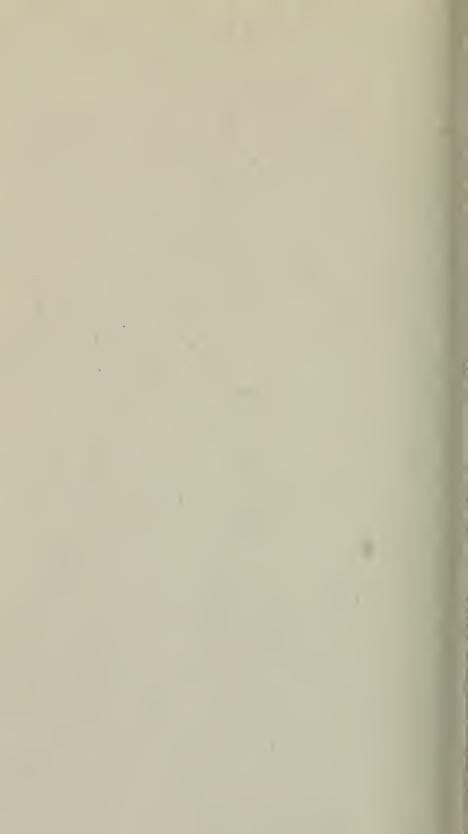
v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

On Petition to Set Aside Decision and Order of the National Labor Relations Board

PETITIONER'S OPENING BRIEF

SHEPPARD, MULLIN, RICHTER & HAMPTON 458 South Spring Street Los Angeles, California 90013 Attorneys for Petitioner



TOPICAL INDEX

		rage
	I	
	Jurisdiction	1
	II	
	Concise statement of the case and questions involved	2
	III	
	Specification of errors	3
	IV	
	Petitioner in no way discriminated against Martinez	3
	v,	
	Conclusion	7
П		

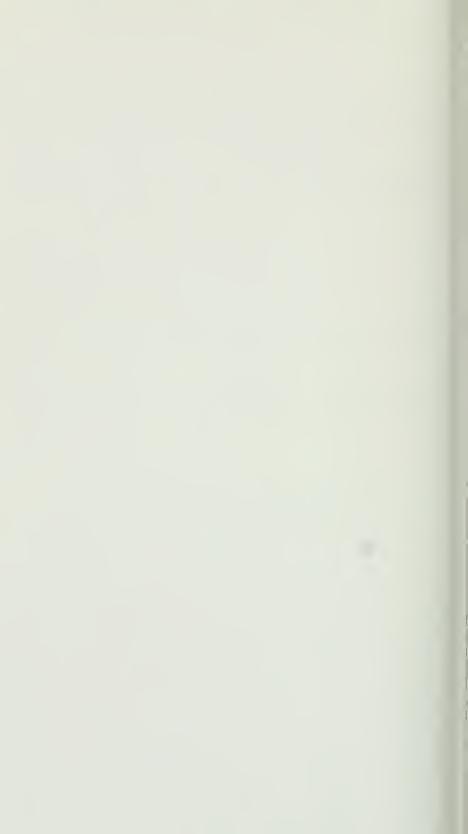


TABLE OF AUTHORITIES CITED

1		
2	Cases	Page
\$	Fort Smith Broadcasting Co. v. NLRB, 341 F.2d 874, 878-79 (8 Cir.1965)	6
4	Metal Processors' Union Local No. 16, AFL-CIO v. NLRB, 337 F.2d 114, 117 (D.C.Cir.1964)	5
6	NLRB v. Ace Comb Co., 342 F.2d 841, 847 (8 Cir. 1965)	6
8	NLRB v. Citizens-News Co., 134 F.2d 970, 974 (9 Cir.1943)	6
	NLRB v. Florida Steel Corp., 308 F.2d 931, 935 (5 Cir.1962)	5
10	NLRB v. Lozano Enterprises, 318 F.2d 41 (9 Cir.1963)	2
	NLRB v. Sebastopol Apple Growers Union, 269 F.2d 705, 713 (9 Cir.1959)	6, 7
13	NLRB v. Threads, Incorporated, 308 F.2d 1, 13 (4 Cir.1962)	5
	NLRB v. United Brass Works, Inc., 287 F.2d 689, 693 (4 Cir.1961)	5
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                    PETITIONER'S OPENING BRIEF
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                           JURISDICTION
lt
           The National Labor Relations Board issued its
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 Decision and Order herein dated January 26, 1965, finding
  Petitioner guilty of a violation of Sections 8(a)(3) and
  (1) of the National Labor Relations Act. This Court has
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  jurisdiction to review the Board's Decision and Order upon
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 petition of Lozano Enterprises, a person aggrieved thereby,
 29 U.S.C.A. § 160(f). Such petition was filed May 12, 1965.
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CONCISE STATEMENT OF THE

CASE AND QUESTIONS INVOLVED.

The facts of this case are simple:

Jose Nabor Villasenor was a night shift linotype

operator for Lozano Enterprises when he was discharged.

 $_{7}$ (TXD p. 2, lines 24-25.) The Ninth Circuit thereafter

siecreed Villasenor's reinstatement. NLRB v. Lozano Enter-

sorises, 318 F.2d 41 (9 Cir.1963).

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Villasenor's reinstatement required his re-employment
as a linotypist on the night shift, his position when terininated and for which a wage premium was paid. (TXD p.
i, lines 15-17.)

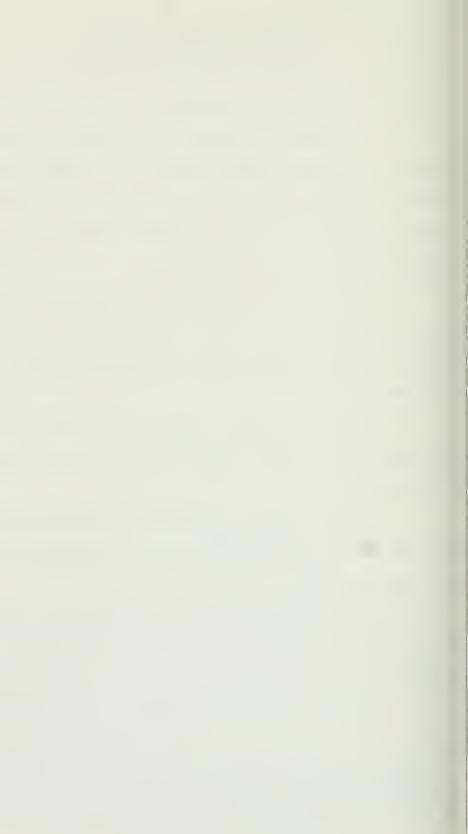
In order to make room for Villasenor, it was necessary to terminate another linotype operator. (TXD). 3, lines 27-31.)

At the time of Villasenor's reinstatement, Javier lartinez was one of four night shift linotypists. (TXD). 2, lines 43-51.)

Martinez was the most junior on the night shift and, in fact, was the most junior but one of all the inotypists in the entire plant. (TXD p. 3, lines 20-23).

Barunda, the only linotypist junior to Martinez,

l"TXD" refers to the Trial Examiner's Decision, adopted by the Board. The facts herein recited are those actually found by the Board.



was the better employee of the two. (TXD p. 5, lines 52-54; p. 8, line 55 - p. 9, line 1.)

Martinez was laid off due to the reinstatement of Villasenor. (TXD p. 2, lines 19-24.)

The question involved is:

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on the night shift, and since the only linotypist in the entire plant more junior to Martinez was a better employee (as found by the Board), was it discriminatory for Petitioner to lay off Martinez in order to reinstate Villasenor to the night shift?

1. Since Martinez was the most junior linotypist

The answer is that it was not discriminatory, and the conclusion of the Board that it was is directly contrary to and is unsupported by the facts found by the Board.

III

SPECIFICATION OF ERRORS

It was error for the Trial Examiner and the Board to conclude that Petitioner discriminated against Martinez and thus violated Sections 8(-)(3) and (1) of the Act.

IV

PETITIONER IN NO WAY DIS-CRIMINATED AGAINST MARTINEZ.

As shown above, the pertinent facts of this



case are simple. The Trial Examiner and the Board both found that Villasenor's reinstatement to the night shift required another linotypist to be laid off. Martinez, the one selected, was the most junior on the night shift and the next most junior in the entire plant. The only linotypist in the whole plant most junior to Martinez was a better employee, as found by the Board. And yet, in the face of these facts as found, the Board concluded that Martinez was discriminated against and that, if there had been no discrimination, Petitioner would have selected the only employee junior to Martinez for the lay off. (TXD p. 10, lines 16-32.) 12 However, the one more junior employee that the Board says should have been selected for the layoff was, as found by the Board, a better employee than Martinez. Since he was a better employee, the Board's conclusion that he would have been the one laid off, absent discrimination against Martinez, is absolutely without support from the evidence. There simply is no reason at all to suppose that Petitioner would or should have laid off an employee who, as found by the Board, was better than Martinez. The mere fact that Martinez was a member of the union does not in and of itself shield him from being

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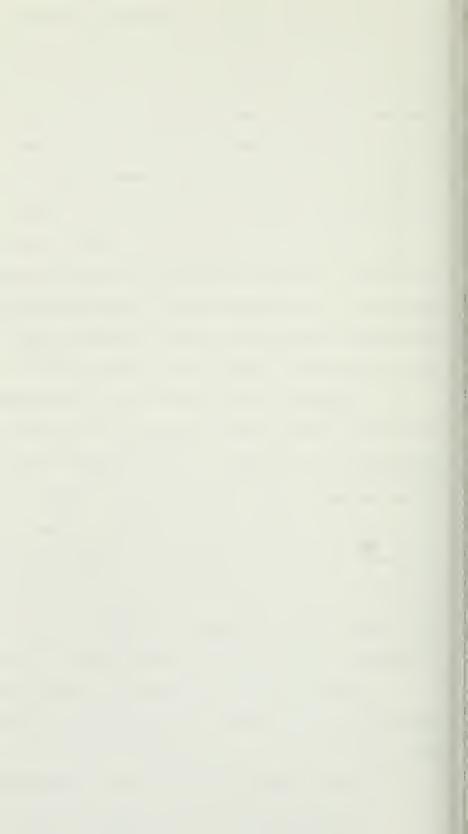
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laid off:

"That [Martinez] was a union member and an active movant in the organizational drive



will not shield him from release for good cause. Martel Mills Corp., supra, at page 633. If discrimination may be inferred from mere participation in union organization and activity followed by a discharge, that inference disappears when a reasonable explanation is presented to show that it was not a discharge for union membership. N.L.R.B. v. Stafford, 8 Cir., 1953, 206 F.2d 19, 23." NLRB v. United Brass Works. Inc., 287 F.2d 689, 693 (4 Cir.1961). See also: NLRB v. Florida Steel Corp., 308 F.2d 931, 935 (5 Cir.1962); NLRB v. Threads, Incorporated, 308 F.2d 1, 13 (4 Cir.1962). As said in Metal Processors' Union Local No. 16. AFL-CIO v. NLRB, 337 F.2d 114, 117 (D.C.Cir.1964), o an inference that an employee was terminated on account 1 of his union activities may not be drawn from the mere 2 fact, as here, that the activities preceded the discharge. 3 Likewise, the slight union animus found in this case by the Board (TXD p. 7, line 40 - p. 8, line 35) is insufficient in itself to ground an inference that Martinez' lay off was violative of the Act. Toid. 5

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The Second, Fourth, Fifth, Sixth, Seventh and Eighth Circuits all subscribe to the same proposition.

Fort Smith Broadcasting Company v. NLRB, 341 F.2d 874, 878-79 (8 Cir.1965); NLRB v. Ace Comb Company, 342 F.2d

841, 847 (8 Cir.1965).

So does the Ninth Circuit, ever since 1943. As said in NLRB v. Citizens-News Co., 134 F.2d 970, 974

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"The fact that a discharged employee may be engaged in labor union activities at the time of his discharge, taken alone, is no evidence at all of a discharge as the result of such activities.

There must be more than this to constitute substantial evidence."

The present case is not a case where the Board

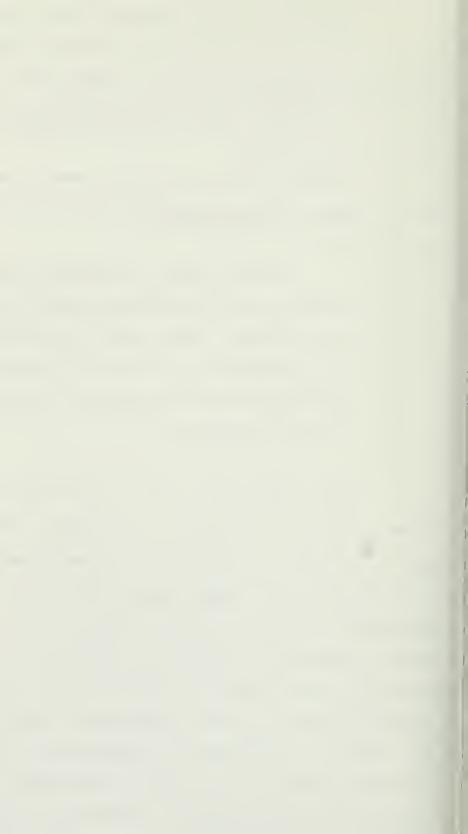
junior employee was not in fact the better employee; this
is a case where the <u>Board itself</u> found that the most junior
employee was better. In the face of this finding, the
Board's decision that the better employee should have been
laid off, rather than Martinez, is for the Board to
intrude directly into the management of Petitioner's business.

found, contrary to Petitioner's testimony, that the most

But this the Board cannot do; management is for management, and neither Board nor Court can second-guess it or give it

NLRB v.

guidance by over-the-shoulder supervision.



Sebastopol Apple Growers Union, 269 F.2d 705, 713 (9 Cir.1959

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CONCLUSION

Petitioner deviated from a strict seniority lay-

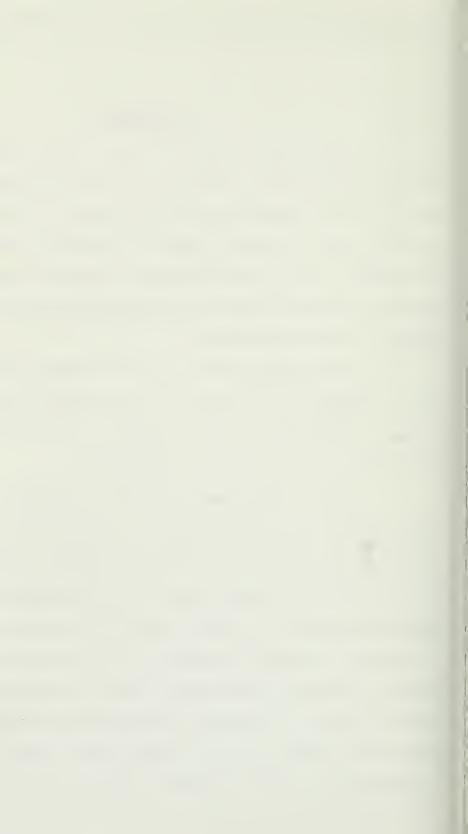
off by only one man. Except for that one man, Martinez was the most junior in the entire plant. With no excep-7 tions, he was the most junior on the shift to which Villasenor had to be reinstated. The one man in the entire plant more junior than Martinez was, as found by the 10 Board, a better employee. Petitioner had to lay off someone to make room 12 for Villasenor. The selection of Martinez was made on 13 normal, logical and fair criteria. It was completely objective. It was not discriminatory. 15 And yet the Board now tells Petitioner that the 16

one single more junior employee to Martinez should have been laid off instead. And the Board says this in the face of its own finding that this one employee was better. By its decision, the Board tells Petitioner to discriminate

in favor of Martinez, because of his union activities, and against the better employee. The Act does not allow this.

By its decision, the Board tells Petitioner that Martinez'
union activities give him special protection against a

necessary lay off. The Second, Fourth, Fifth, Sixth,



Seventh, Eighth, Ninth and District of Columbia Circuits do not allow this. The Board should be reversed. 3 4 October 28, 1965. DATED: € Respectfully submitted, SHEPPARD, MULLIN, RICHTER & HAMPTON 10 Simpson 11

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Attorneys for Petitioner,

Lozano Enterprises



I certify that, in connection with the preparation

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of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those Rules.



PROOF OF SERVICE

I, the undersigned, being first duly sworn, say that I am and was at all times herein mentioned a United States citizen and a Los Angeles, California, resident, over 18 years of age and not a party to the within action; that on 28 October 1965 I served the within Petitioner's Opening Brief on the below-named parties in said action, by depositing true copies thereof, enclosed in sealed envelopes with postage thereon fully prepaid, in a mail-box regularly maintained by the United States Government at Los Angeles,

California, addressed as follows: National Labor Relations Board (3 copies)

Washington 25, D.C.

General Counsel, National Labor Relations Board, 21st Region 849 South Broadway, Los Angeles, California 90014

James R. Webster, Esquire, Trial Examiner

National Labor Relations Board

Federal Building

450 Golden Gate Avenue

San Francisco, California

Subscribed and sworn to before me 28 October 1965.

8 761 LO 8000 ADV

Notary Public. California

Principal office, Los Angeles County

E. M. DOIRON My Commission Expires February 17, 1866



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Shirley Schuster

LOS ANGLES COUNTY

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